



SO ORDERED.

SIGNED this 18 day of September, 2006.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

A handwritten signature in black ink, appearing to read "R. Stair Jr.", is written over a horizontal line.

**Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-30194

CHARLES EDDIE ARMS
d/b/a ARMS TRUCKING

Debtor

MEMORANDUM AND ORDER

Before the court is the Objection by Chapter 13 Trustee to Proof of Claim Filed by Orix Financial Services Inc. (Objection to Claim) filed by the Chapter 13 Trustee, Gwendolyn M. Kerney, on July 25, 2006, objecting to the \$69,885.26 unsecured claim filed by Orix Financial Services, Inc. (Orix) on July 14, 2006, and the Response to Disallowance of Claim filed by Orix on August 21, 2006. A hearing was held on September 13, 2006, at which time the parties agreed that the court would resolve this contested matter on the existing record and that an evidentiary hearing would not be necessary.

From the undisputed record in this bankruptcy case, the court makes the following findings of fact:

1. The Debtor filed the Voluntary Petition commencing his bankruptcy case under Chapter 13 on January 14, 2003. As evidenced by its Proof of Claim filed on February 27, 2003, Orix was a creditor of the Debtor, holding a claim in the amount of \$110,930.76 secured by two (2) Freightliner 2000 Dump Trucks (Dump Trucks).

2. Under the terms of the Debtor's Chapter 13 Plan confirmed on April 14, 2003 (Confirmed Plan), the allowed secured claim of Orix was fixed at \$110,000.00 and was to be paid over the 60-month life of the plan at \$2,400.00 per month at eight percent (8%) interest.

3. The Confirmed Plan, after notice to Orix and without objection, was modified to, *inter alia*, provide for the Debtor's surrender of the Dump Trucks with Orix to have "an allowed deficiency claim" to be paid as unsecured by virtue of the Order Granting Motion to Modify and Confirming Modified Plan (Modified Confirmed Plan) entered on November 22, 2005.

4. On February 27, 2006, the Chapter 13 Trustee filed an Objection by Chapter 13 Trustee to Proof of Claim Filed by Orix Financial Services Inc. (February 27, 2006 Objection), requesting that the secured claim filed by Orix on February 27, 2003, be disallowed as secured except to the extent already paid "unless an amended deficiency claim is filed within ninety (90) days." On April 5, 2006, without objection, the court entered an Order Resolving Chapter 13 Trustee Objection to Proof of Claim Filed by Orix Financial

Services Inc. (April 5, 2006 Order), which provides that the secured claim filed by Orix “shall be disallowed except to the extent already paid unless a future amended deficiency claim is filed within ninety (90) days from the date of this order.” The April 5, 2006 Order was served on Orix via first class mail on April 7, 2006. Orix filed its \$69,885.26 unsecured deficiency claim on July 14, 2006, ten days after expiration of the 90-day deadline fixed by the April 5, 2006 Order.

5. The Chapter 13 Trustee, on July 25, 2006, filed the present Objection to Claim, objecting to allowance of the Orix \$69,885.26 deficiency claim because the claim was filed beyond the 90-day deadline fixed by the court in the April 5, 2006 Order. Orix filed its Response to Disallowance of Claim on August 21, 2006, with a supporting Affidavit of Yvonne Kalpakoff, an Orix senior vice president. In her Affidavit, Ms. Kalpakoff states that Orix failed to timely file its unsecured deficiency claim for the following reasons:

3. Orix Financial Services, Inc. is in the process of downsizing the operations where I work in Kennesaw, Georgia. The Orix offices in Kennesaw has responsibility for the bankruptcy case of Charles Eddie Arms.

4. As a result of the downsizing, the information regarding the filing of the Amended Claim was misplaced and as a result, it was not timely filed. There literally are thousands of files located in Kennesaw and due to the reduction in personnel, it has been difficult to keep all documents filed properly. When the information regarding this claim was found, an Amended Proof of Claim was promptly filed.

KALPAKOFF AFF. at ¶¶ 3, 4.

Orix does not dispute that it received the Modified Confirmed Plan providing for the surrender of the Dump Trucks and for it to have an unsecured deficiency claim, the February 27, 2006 Objection which clearly placed Orix on notice that the Chapter 13 Trustee was requesting an

order allowing Orix 90 days to file its deficiency claim, or the April 5, 2006 Order within sufficient time to comply with the 90-day deficiency claim filing deadline. Instead, Ms. Kalpakoff states that Orix “misplaced” the “information” related to its deficiency claim and that when the “information” was found, its amended Proof of Claim was “promptly” filed. Ms. Kalpakoff does not, however, explain when Orix personnel first began seeking the “information” that she states was “misplaced,” nor does she state when that “information” was, in fact, found.

Orix is not an unsophisticated creditor or a one-time player in the bankruptcy arena. On November 24, 2005, Orix was served with a copy of the Modified Confirmed Plan expressly setting forth that Orix would have an unsecured deficiency claim following surrender of the Dump Trucks, and on February 27, 2006, Orix was served by the Chapter 13 Trustee with the February 27, 2006 Objection together with a copy of the proposed April 5, 2006 Order.¹ Therefore, it knew as early as November 2005, and no later than February 2006, that it would be required to file a deficiency claim if it was to participate as an unsecured creditor in this Chapter 13 case. Orix had over seven months notice that it would be required to file a deficiency claim in order to participate further in the Debtor’s bankruptcy case, and, upon receipt of the Trustee’s February 27, 2006 Objection, it had five months actual notice that it would be required to file its deficiency claim within 90 days after entry of an order sustaining the February 27, 2006 Objection. Furthermore, Orix realized the value of its

¹ Local Rule 9013-1(c) of the Local Rules of the United States Bankruptcy Court for the Eastern District of Tennessee requires that an objection to claim be accompanied by a proposed order granting the requested relief, which must be served with the objection.

collateral at a public sale on February 9, 2006, more than two weeks before the Chapter 13 Trustee even filed her February 27, 2006 Objection and almost two months before entry of the April 5, 2006 Order fixing its 90-day deficiency claim deadline was entered.² Ms. Kalpakoff's Affidavit makes no mention that the amount of Orix's deficiency claim had, in fact, been established as early as February 9, 2006.

Based upon the foregoing, the court does not find Ms. Kalpakoff's explanation for Orix's late-filed deficiency claim to be complete or satisfactory. Quite simply, Orix had ample notice and opportunity to ensure that its deficiency claim was filed prior to the July 14, 2006 deadline, and it alone must bear the consequences of its failure to do so.

In summary, the court finds that the Chapter 13 Trustee's July 25, 2006 Objection to Claim is well taken and the same is SUSTAINED. "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1648

² The Proof of Claim filed by Orix on July 14, 2006, relating to its deficiency claim establishes that Orix began proceedings to liquidate its secured interest in the two Dump Trucks on January 23, 2006, by service of a Notice of Public Sale on the Debtor, advising him that the trucks would be sold on February 9, 2006. Notice of the sale was also published in the Memphis Business Journal on February 6, 2006, and the Dump Trucks were thereafter sold on February 9, 2006, resulting in a net return to Orix of \$41,045.50. Although the Order Granting Motion to Modify and Confirming Modified Plan entered on November 22, 2005, expressly states that the Debtor was surrendering the Dump Trucks, and Orix would be granted an allowed, unsecured deficiency claim, the record in this bankruptcy case does not reflect that Orix ever obtained relief from the automatic stay authorizing it to liquidate the Dump Trucks prior to doing so in February 2006.

(1992). The \$69,885.25 unsecured deficiency claim filed by Orix Financial Services, Inc., on July 14, 2006, is DISALLOWED in its entirety.³

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³ In its Response to Disallowance of Claim filed on August 21, 2006, Orix states that 11 U.S.C.A. § 502(j) (West 2004) allows the court to reconsider allowed or disallowed claims based upon the equities of the case. This is true and, in fact, the Chapter 13 Trustee's Objection to Claim is allowed entirely because of § 502(j).

It has been well established that the Chapter 13 Trustee is the primary obligor on payment disbursements under a confirmed Chapter 13 plan. It is also well understood, and beyond peradventure that all parties to the confirmation order are bound by its preclusive effect. Furthermore, it is well established that § 502(j) gives the Chapter 13 Trustee standing to file a motion seeking to disallow a previously allowed claim at any time before the case is closed.

In re Lee, 189 B.R. 692, 695 (Bankr. M.D. Tenn. 1995). Whether cause exists is determined on a case-by-case basis, and the court is given "substantial discretion" in making the determination. *Baxter v. Sys. & Servs. Techs., Inc. (In re Dykes)*, 287 B.R. 298, 303 (Bankr. S.D. Ga. 2002); *see also In re Colonial Realty Co.*, 202 B.R. 185, 187 (Bankr. D. Conn. 1996) ("What exactly constitutes cause according to the equities of the case is not entirely clear. Thus, the determination of whether or not to reconsider falls upon the equitable judgment of the court and is within the sound discretion of the court.") (quoting *In re Flagstaff Foodservice Corp.*, 56 B.R. 910, 913 (Bankr. S.D.N.Y. 1986)).

Nevertheless, § 502(j) is not applicable with respect to Orix because, prior to entry of the court's order, the Chapter 13 Trustee's Objection to Claim had not been sustained and, thus, Orix's late-filed claim had yet to be disallowed. Furthermore, based upon the equities of the case, as outlined above, even under a § 502(j) analysis, the court's decision to sustain the Chapter 13 Trustee's Objection to Claim remains the same.